

PTO Form 1960 (Rev 9/2007)

OMB No. xxx-xxxx (Exp. x/xxxx)

## Request for Reconsideration after Final Action

The table below presents the data as entered.

Input Field	Entered
SERIAL NUMBER	78884488
LAW OFFICE ASSIGNED	LAW OFFICE 114
MARK SECTION (no change)	
ARGUMENT(S)	
<p><b><u>RESPONSE</u></b></p> <p>This submission is in response to the Office Action mailed April 30, 2007 concerning the above-captioned mark.</p>	
<p><b><u>REMARKS</u></b></p> <p>The Examining Attorney has continued its refusal to register on the ground that Applicant's mark ROTO SHAVE so closely resembles Registration No. 2,987,507 for the mark ROTORAZOR for "razors for cutting hair" that it is likely to cause confusion, mistake or to deceive under Trademark Act Section 2(d), 15 U.S.C. 1052(d). Applicant respectfully requests reconsideration.</p> <p>The Second Office Action continues to insist there exists a likelihood of confusion based on an abstract assessment of the parties marks that fails to consider certain facts – in particular the specification of goods in the cited registration and what that specification signifies. In its response to the First Office Action, Applicant invited the Examining Attorney to review the actual "razors for cutting hair" that are the subject of Registration No. 2,987,507 for the mark ROTORAZOR. Because Applicant evidently failed to make clear why it believed such a consideration is so critical and because it does not appear from the Second Office Action that such a consideration has been made, Applicant submits herewith the specimen of use that accompanied the subject registration and printouts from the registrant's website, which not only show that the element ROTO as used in the registered mark is</p>	

purely descriptive of the goods, but also helps clarify the meaning of the product specification “razors for cutting hair”, which describes a product that is made for “hair styling” - not for use in a manner at all comparable to Applicant’s electric razors and related goods. To better assist the Examining Attorney’s continuing review, promotional literature for Applicant’s ROTO SHAVE product is also attached. (Exhibit A hereto.)

Without disputing that it is the specification of goods that defines the scope of a registration – not any one particular product sold within that specification – is it essential to consider the only product the Registrant sells (as shown for instance in the specimens accompanying the registration) in order to understand what is meant by the specification, “razors for cutting hair”. It is indeed apparent from the Registrant’s specimen of use accompanying the application, not to mention the Registrant’s web-site, that the Registrant makes and sells hair styling products for use solely by beauty salons. The specimen accompanying the subject application (Exh. B hereto) shows a “Rotorazor fully rotational styling razor”. Registrant’s website page for the product, to which Applicant referred in its response to the First Office Action explains: “Rotorazor: revolutionary tool ... which allows versatility in the razor styling category ...” (Exh. C hereto.) The Registrant’s Internet home page similarly uses the tag line “Providing all the tools needed to propel your business beyond expectations.” (Exh. D hereto.) The business at issue is hair salons. The “company biography (Exh. E hereto) explains the company was formed by a hair stylist, and uses the further tag line: “Crickett. The Professional Stylist’s partner.”

That same page provides a link to an article about the company in the March 2004 issue of the magazine, Beauty Store Business. Among other things, the article quotes the company manager (son of its founder) as saying “We’ve always been an industry leader in terms of introducing new and innovative tools to the professional market.”

Hence, there can be no doubt that what is meant by the specification for the subject Registration for ROTORAZOR, is that the device is used “for cutting hair”. Razor styling is a technique for cutting hair – not for shaving the whiskers on one’s face or the stubble on one’s legs.

Whether or not any such product ever find its way into the hands of an individual consumer (the target market for Applicants shaving devices), once the meaning of the specification is understood it becomes clear why the market for the Registrant’s goods would be professionals, not individual

consumers. Very simply, even with the aid of a mirror, individuals can't readily style their own hair. Even if the specification itself does not make clear that such a shearing device is not sold solely to professionals for such use in beauty salons, there can be no question the product is NOT designed for individual users to shave their own faces (or their legs or underarms). It simply is not a shaver. As such, and even apart from the statements on Registrant's website, it is apparent that Registrant's hair cutting device would not be sold in the same channels of trade (drug stores and supermarkets) that sell shaving devices. In short, the products thus are not used for the same purpose, are not used by the same consumers (at least not in their roles as consumers) and would not be sold in competitive proximity.

What is also evident from a review of the Registrant's specimen of use and its web-site is that the term "ROTO" as used in ROTORAZOR is purely descriptive – as is the entire term ROTORAZOR. It is a razor that rotates. Nothing more. As the specimen of use states, it's a "fully rotational styling razor." The product page on Registrant's website further explains that what is "revolutionary" about the ROTORAZOR is its "fully rotational cutting blade..." See Exhs. B and C hereto.

The likelihood of confusion determination under Section 2(d) is based on an analysis of all the probative facts in evidence that are relevant to the factors set forth in *In re E.I. DuPont de Nemours & Co.*, 476 F.2d 1357, 1361, 177 U.S.P.Q. 563, 567 (C.C.P.A. 1973). The *DuPont* factors are generally applied on a case-by-case basis, the fundamental inquiry being "the cumulative effect of differences in the essential characteristics of the goods [or services] and differences in the marks." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 1103, 192 U.S.P.Q. 24, 29 (C.C.P.A. 1976); *see also Toro Co. v. GrassMasters Inc.*, 66 U.S.P.Q.2d 1032, 1035-36 (T.T.A.B. 2003). It is well-settled that likelihood of confusion is synonymous with "probable" confusion, as opposed to "possible" confusion. *See, e.g., Rodeo Collection, Ltd. v. West Seventh*, 812 F.2d 1215, 1217, 2 U.S.P.Q.2d 1204, 1206 (9th Cir. 1987) ("Likelihood of confusion requires that confusion be probable, not simply a possibility."). Applying this test, the parties' marks should not be deemed confusingly similar.

**The Parties' Products and Trade Channels Fundamentally Differ**

Even if the marks are identical, confusion is not likely if the goods are unrelated, as they

are in this case. T.M.E.P. 1207.01(a)(i); *Local Trademarks, Inc. v. Handy Boys Inc.*, 16 U.S.P.Q.2d 1156 (T.T.A.B. 1990). A likelihood of confusion is not present simply because two marks are used in connection with a broad category of products having only a modest relationship. See, e.g., *Local Trademarks*, 16 U.S.P.Q.2d at 1156 (LITTLE PLUMBER for liquid drain opener held not confusingly similar to LITTLE PLUMBER and design for advertising services, namely the formulation and preparation of advertising copy and literature in the plumbing field); *Quartz Radiation Corp. v. Comm/Scope Co.*, 1 U.S.P.Q.2d 1668 (T.T.A.B. 1986) (QR for coaxial cable held not confusingly similar to QR for various products (e.g., lamps, tubes), both related to the photocopying field); *Electronic Design and Sales Inc. v. Electronic Data Sys.*, 954 F.2d 713, 21 U.S.P.Q.2d 1388 (Fed. Cir. 1992) (no source confusion between Applicant's power supply goods and Opposer's computer services in which both used identical marks and marketed to the same entities).

Applicant's description of goods and the cited registration are distinct, with absolutely no overlap – albeit that both are used on a kind of hair. However, the products are used on different types of hair, are used for different purposes and are purchased by different users. A scissor can also be used to cut hair, but that does not make it inherently similar to an electric shaver. The Examining Attorney continues to treat the goods as if they were virtually the same or directly competing. Because they are not, it bears repeating that when the goods are distinct, they need not be thought of as related. See *In re British Bulldog, Ltd.*, 224 U.S.P.Q.2d 854, 856 (T.T.A.B. 1984); see also *Meija & Assocs.*, 920 F. Supp at 548 (“The question is whether the parties offer their products to the same market audience, not whether participants on one market may coincidentally be consumers in another.”); *Hi-Country Foods Corp. v. Hi Country Beef Jerky*, 4 U.S.P.Q.2d 1169, 1171-72 (T.T.A.B. 1987) (“Notwithstanding these common trade channels, it has often been stated that there can be no ‘per se’ rule that all food products are related goods by nature or by virtue of their capability of being sold in the same food markets, (i.e., the modern supermarket environment with its enormous variety of food, cleaning, paper and other products stocked and offered for sale).”).

Because individuals can not readily style their own hair, and because the Registrants goods are in fact sold only for professional use in hair salons, the trade channels are completely distinct – no more alike in their own way than are dentists' drills and toothbrushes.

As a result, there is no likelihood of confusion. *Recot Inc. v. M.C. Becton No. 99-1291*, 54 U.S.P.Q.2d 1894, 1900 (Fed. Cir. 2000); *Electronic Design*, 954 F.2d at 717; *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 1103, 192 U.S.P.Q. 24, 26 (C.C.P.A. 1976). In *Motor Master*, for example, the court found that there was no likelihood of confusion between almost identical marks due, in part, to the “well-recognized distinction in the automotive aftermarket between manufacturers and warehouse distributors.” 202 U.S.P.Q. at 218.

In *Astra Pharmaceutical Products, Inc. v. Beckman Instruments, Inc.*, 718 F.2d 1201, 220 U.S.P.Q. 786, 790 (1st Cir. 1983), both parties marketed and sold goods under the mark ASTRA to the same purchasing institution—large hospitals. Opposer sold local anesthetics, cardiovascular medicines and prefilled syringes to hospital pharmacists and anesthesiologists, whereas applicant sold a highly technical and large blood analyzing machine to specialists in hospital chemistry laboratories. The court stated that “[i]f likelihood of confusion exists, it must be based on the confusion of some relevant person; i.e., a customer or purchaser.” *Id.* at 1206, 220 U.S.P.Q. at 790. Noting that similarity of trade channels or overlap of customers is not established simply because both parties conduct business in the same general field and sell their products to the same institution, the court found the purchasing institution, a hospital, not to be the relevant purchaser as it “is composed of separate departments with diverse purchasing requirements, which, in effect, constitute different markets for the parties’ respective goods.” *Id.* at 1207, 220 U.S.P.Q. at 791; see also *Electronic Design*, 954 F.2d at 717.

It also bears noting that it would be inconsistent with the Board’s holding in *Medinol Ltd. v. Neuro Vasx Inc.*, 67 U.S.P.Q. 2d 1205 (T.T.A.B. 2003), and the many unpublished decisions that have followed in its wake[1] to accord too wide a scope to a chosen specification of goods if that specification bears insufficient relationship to the actual goods on which the mark is used. Otherwise, simply by claiming too broad a specification, a registrant would be able to attain unfairly broad rights covering goods or services on which it does not use its mark – the very evil *Medinol* sought to prevent.

As such, although the parties’ products may be used on hair, confusion is unlikely considering that the products are unrelated and marketed to entirely different classes of consumers. See *Electronic Design*, 954 F.2d at 717 (where both parties’ goods were purchased by the same large corporations with individual departments, “it cannot be presumed, as the Board apparently did, that the [Opposer’s]

general computer services are selected by the same individuals who select [Applicant's] battery chargers and power supplies.").

**The Parties' Marks Are Easily Distinguished**

Even if the marks were identical, it would not necessarily result in a finding of a likelihood of confusion, as many cases have found that two marks sharing common terms but combined with other elements are sufficiently different in their entireties to avoid a likelihood of confusion.[2] *See, e.g., Conde Nast Publications, Inc. v. Miss Quality, Inc.*, 507 F.2d 1404 (C.C.P.A. 1975) (COUNTRY VOGUES for ladies' and misses' dresses is not confusingly similar to VOGUE magazine); *see also Lever Bros. Co. v. Barcelene Co.*, 463 F.2d 1107 (C.C.P.A. 1972) (ALL CLEAR for household cleaner not confusingly similar to ALL household cleaning products); *Plus Prods. v. Natural Organics, Inc.*, 204 U.S.P.Q. 773 (T.T.A.B. 1979) (PLUS and NATURE'S PLUS, both for vitamins, not confusingly similar); *Plus Prods. v. General Mills, Inc.*, 188 U.S.P.Q. 520 (T.T.A.B. 1975) (PROTEIN PLUS for breakfast cereal and PLUS for vitamin and mineral products and food supplements not confusingly similar); *Marshall Field & Co. v. Mrs. Fields Cookies*, 25 U.S.P.Q.2d 1321 (T.T.A.B. 1992) (holding that MARSHALL FIELD'S and FIELD'S, both for department store services including baked goods, created no likelihood of confusion with MRS. FIELDS, for cookies and brownies); *Freedom Savings & Loan Ass'n v. Way*, 757 F.2d 1176, 1182 (11th Cir. 1985); *Alltel Corp. v. Actel Integrated Communications, Inc.*, 42 F. Supp. 2d 1265, 1270 (S.D. Ala. 1999).

Even marks that are identical in sound and/or appearance may create sufficiently different commercial impressions when applied to the respective parties' goods or services so that there is no likelihood of confusion. *See In re Shoe Works*, 6 U.S.P.Q.2d 1890 (T.T.A.B. 1988) (no likelihood of confusion between two users of PALM BAY mark on wearing apparel); *In re British Bulldog, Ltd.*, 224 U.S.P.Q. 854 (T.T.A.B. 1984) (PLAYERS for men's underwear held not likely to be confused with PLAYERS for shoes, the Board finding that the term PLAYERS implies a fit, style, color and durability adapted to outdoor activities when applied to shoes, but "implies something else, primarily indoors in nature" when applied to men's underwear); *In re Sydel Lingerie Co., Inc.*, 197 U.S.P.Q. 629 (T.T.A.B. 1977) (BOTTOMS UP for ladies' and children's underwear held not likely to be confused with BOTTOMS UP for men's clothing, the Board finding that the term connotes the drinking phrase "Drink Up" when

applied to men's suits, coats and trousers, but does not have this connotation when applied to ladies' and children's underwear). Thus, each case must be decided on its own facts and circumstances, including "the nature and impact of the marks." *In re British Bulldog, Ltd.*, 224 U.S.P.Q. at 856 (quoting *In re Sydel Lingerie*, 197 U.S.P.Q. at 630).

**ROTORAZOR Is a Weakly Descriptive Mark**

The strength of a mark is determined by its distinctiveness. *See, e.g., Sara Lee Corp. v. Kayser-Roth Corp.*, 81 F.3d 455, 464, 38 U.S.P.Q.2d 1449 (4th Cir. 1996). Distinctiveness is characterized by whether the mark is considered "fanciful," "arbitrary," "suggestive," "descriptive," or "generic," in descending order of strength. *See id.* Descriptive and suggestive marks are presumptively weak, while fanciful and arbitrary marks are afforded greater protection. *Brookfield Comm., Inc. v. West Coast Entertainment Corp.*, 174 F.3d 1036, 1058, 50 U.S.P.Q.2d 1545, 1560 (9th Cir. 1999); *Virgin Enterprises Ltd. v. Nawab*, 335 F.3d 141, 147-48, 67 U.S.P.Q.2d 1420, 1425-26 (2d Cir. 2003).

ROTORAZOR is best categorized as descriptive (as previously argued) – or at most suggestive - thus affording it only modest scope of protection. A suggestive mark "merely suggests the features of the product, requiring the purchaser to use imagination, thought, and perception to reach a conclusion as to the nature of the goods." *Lane Capital Mgmt., Inc. v. Lane Capital Mgmt. Inc.*, 192 F.3d 337, 344, 52 U.S.P.Q.2d 1094 (2d Cir. 1999). To be considered suggestive (as opposed to arbitrary or fanciful), the mark need not describe the goods entirely, but rather suggest certain features of the goods, as the cited mark does here. *See, e.g., Independent Nail & Packing Co. v. Stronghold Screw Prods., Inc.*, 205 F.2d 921, 925 98 U.S.P.Q. 172 (7th Cir. 1953) ("Stronghold" suggestive of plaintiff's nail products).

Widespread use and the obvious meaning of "Roto" further weakens Registrant's mark. Whether or not there are only two applications or registrations in the subject class, the International Classes are for administrative convenience only. The important point is that Roto is widely used and hence can not be distinctive. Indeed, the Examining Attorney does not contest that the PTO registry lists at least 262 applications or issued registrations incorporating the primary element "ROTO". And it is no surprise that so many marks have been able to co-exist peacefully on the Principal Register for years with no known instance of confusion. Because the root "Roto" is descriptive of rotation and is

used in precisely that way by the Registrant, consumers have no difficulty distinguishing innumerable products incorporating the term. Because the registered mark is so weakly descriptive, it is entitled to only the narrowest scope of protection. See *Moose Creek, Inc.*, 73 U.S.P.Q.2d at 1293 (“[M]embers of the public...have likely seen a picture of a realistic-looking moose on many different brands of clothing, and thus are not likely to associate an Abercrombie product containing a picture of a moose exclusively with Plaintiffs’ Moose Creek clothing brand.”); *Abraham Zion Corp.*, 761 F.2d at 111 (affirming the district court’s finding of no likelihood of confusion based, in part, on “evidence that there are several fashion designers who have the same surnames and operate in the marketplace without apparent consumer confusion”).

### CONCLUSION

Based upon the foregoing, Applicant submits that the mark ROTO SHAVE is entitled to registration on the Principal Register. Applicant thus respectfully requests that the Examiner withdraw the 2(d) objection and pass the application on to publication. In case this Request for Reconsideration is denied, Applicant has also concurrently filed a Notice of Appeal.

[1] See *Standard Knitting Ltd. v. Toyota Jidosha Kabushiki Kaisha*, Opposition No. 91116242 (T.T.A.B. 2006); *J. E. M. International, Inc. v. Happy Rompers Creations Corp.*, Cancellation No. 92043073 (T.T.A.B. 2005); *Physicians Formula Cosmetics, Inc. v. Cosmed, Inc.*, Cancellation No. 92040782 (T.T.A.B. 2005); *Tequila Cazadores S.A. v. Tequila Centinela, S.A.*, Opposition No. 91125436 (T.T.A.B. 2004); *Orion Electric Co. v. Orion Electric Co.*, Opposition No. 9112807 (T.T.A.B. 2004); *Hawaiian Moon, Inc. v. Doo*, Cancellation No. 92042101 (T.T.A.B. 2004); *Jimlar Corp. v. Monterexport S.P.A.*, Cancellation No. 92032471 (T.T.A.B. 2004); *Nougat London Ltd. v. Garber*, Cancellation No. 40,460 (T.T.A.B. 2003).

[2] Whether a likelihood of confusion exists must depend ultimately on the overall impression the marks leave on consumers. In evaluating overall impressions on consumers, each mark must be viewed in its entirety and not judged by its individual components. *Professional Art Distribution, Inc. v. Internationaler Zeichenverbank Fur Kunstdruckpapier*, 878 F.2d 1445 (Fed. Cir. 1989). The Examining Attorney must focus on each mark as a whole, based on its overall sight, sound, and connotation, instead of just its component parts. See *In re Nat’l Data Corp.*, 753 F.2d 1056, 1058 (Fed. Cir. 1985); see also *Massey Junior College, Inc. v. Fashion Inst. of Tech.*, 492 F.2d 1399, 1402 (C.C.P.A. 1974); J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition*, §23.15[1] (a)(4<sup>th</sup> ed.). Even if each mark contains common or similar words, the marks should be considered in their entirety. See also *Estate of P.D. Beckwith, Inc. v. Comm’r of Patents*, 252 U.S. 538, 545-6 (1920) (“The commercial impression of a trademark is derived from it as a whole, not from its elements



separated and considered in detail. For this reason it should be considered in its entirety . . . , and to strike out any considerable part of it, certainly any conspicuous part of it, would be to greatly affect its value.”) The test is the impression created by each mark as a whole as perceived by the average reasonably prudent purchaser. *Clairol, Inc. v. Roux Labs, Inc.*, 442 F.2d 980 (C.C.P.A. 1971); *Colgate-Palmolive, Co. v. Carter-Wallaced, Inc.*, 432 F.2d 1400 (C.C.P.A. 1970). The “well established” standard for judging the similarity of appearance of marks is an assessment of “the total effect of the designation, rather than . . . a comparison of individual features.” *Sun Banks of Florida v. Sun Federal Savings and Loan*, 211 U.S.P.Q. 844, 850 (5th Cir. 1981) (citations omitted). Viewed in their entireties, Applicant’s mark differs conspicuously in overall appearance from the cited application.

**EVIDENCE SECTION**

EVIDENCE FILE NAME(S)	
<b>ORIGINAL PDF FILE</b>	<a href="http://tgate/PDF/RFR/2007/10/30/20071030163614674596-78884488-001_001/evi_3811218420-163024209_._Exhibit_A-E.pdf">http://tgate/PDF/RFR/2007/10/30/20071030163614674596-78884488-001_001/evi_3811218420-163024209_._Exhibit_A-E.pdf</a>
<b>CONVERTED PDF FILE(S) (11 pages)</b>	<a href="#">\\TICRS2\EXPORT14\788\844\78884488\xml1\RFR0002.JPG</a>
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<b>DESCRIPTION OF EVIDENCE FILE</b>	Exhibit A-E
SIGNATURE SECTION	
<b>RESPONSE SIGNATURE</b>	/Jonathan Moskin/

SIGNATORY'S NAME	Jonathan Moskin
SIGNATORY'S POSITION	Attorney of record
DATE SIGNED	10/30/2007
AUTHORIZED SIGNATORY	YES
CONCURRENT APPEAL NOTICE FILED	YES
<b>FILING INFORMATION SECTION</b>	
SUBMIT DATE	Tue Oct 30 16:36:14 EDT 2007
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OMB No. xxxx-xxxx (Exp. x/xxxx)

### Request for Reconsideration after Final Action

#### To the Commissioner for Trademarks:

Application serial no. **78884488** has been amended as follows:

#### ARGUMENT(S)

In response to the substantive refusal(s), please note the following:

#### RESPONSE

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#### REMARKS

The Examining Attorney has continued its refusal to register on the ground that Applicant's mark ROTO SHAVE so closely resembles Registration No. 2,987,507 for the mark ROTORAZOR for "razors for cutting hair" that it is likely to cause confusion, mistake or to deceive under Trademark Act Section 2(d), 15 U.S.C. 1052(d). Applicant respectfully requests reconsideration.

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Applying this test, the parties’ marks should not be deemed confusingly similar.

**The Parties’ Products and Trade Channels Fundamentally Differ**

Even if the marks are identical, confusion is not likely if the goods are unrelated, as they are in this case. T.M.E.P. 1207.01(a)(i); *Local Trademarks, Inc. v. Handy Boys Inc.*, 16 U.S.P.Q.2d 1156 (T.T.A.B. 1990). A likelihood of confusion is not present simply because two marks are used in connection with a broad category of products having only a modest relationship. *See, e.g., Local Trademarks*, 16 U.S.P.Q.2d at 1156 (LITTLE PLUMBER for liquid drain opener held not confusingly similar to LITTLE PLUMBER and design for advertising services, namely the formulation and preparation of advertising copy and literature in the plumbing field); *Quartz Radiation Corp. v. Comm/Scope Co.*, 1 U.S.P.Q.2d 1668 (T.T.A.B. 1986) (QR for coaxial cable held not confusingly similar to QR for various products (e.g., lamps, tubes), both related to the photocopying field); *Electronic Design and Sales Inc. v. Electronic Data Sys.*, 954 F.2d 713, 21 U.S.P.Q.2d 1388 (Fed. Cir. 1992) (no source confusion between Applicant’s power supply goods and Opposer’s computer services in which both used identical marks and marketed to the same entities).

Applicant’s description of goods and the cited registration are distinct, with absolutely no overlap – albeit that both are used on a kind of hair. However, the products are used on different types of hair, are used for different purposes and are purchased by different users. A scissor can also be used to cut hair, but that does not make it inherently similar to an electric shaver. The Examining Attorney continues to treat the goods as if they were virtually the same or directly competing. Because they are not, it bears repeating that when the goods are distinct, they need not be thought of as related. *See In re British Bulldog, Ltd.*, 224 U.S.P.Q.2d 854, 856 (T.T.A.B. 1984); *see also Meija & Assocs.*, 920 F. Supp at 548 (“The question is whether the parties offer their products to the same market audience, not whether participants on one market may coincidentally be consumers in another.”); *Hi-Country Foods Corp. v. Hi Country Beef Jerky*, 4 U.S.P.Q.2d 1169, 1171-72 (T.T.A.B. 1987) (“Notwithstanding these common trade channels, it has often been stated that there can be no ‘per se’ rule that all food products are related goods by nature or by virtue of their capability of being sold in the same food markets, (i.e., the modern supermarket environment with its enormous variety of food, cleaning, paper and other products stocked

and offered for sale).”).

Because individuals can not readily style their own hair, and because the Registrants goods are in fact sold only for professional use in hair salons, the trade channels are completely distinct – no more alike in their own way than are dentists’ drills and toothbrushes.

As a result, there is no likelihood of confusion. *Recot Inc. v. M.C. Becton No. 99-1291*, 54 U.S.P.Q.2d 1894, 1900 (Fed. Cir. 2000); *Electronic Design*, 954 F.2d at 717; *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 1103, 192 U.S.P.Q. 24, 26 (C.C.P.A. 1976). In *Motor Master*, for example, the court found that there was no likelihood of confusion between almost identical marks due, in part, to the “well-recognized distinction in the automotive aftermarket between manufacturers and warehouse distributors.” 202 U.S.P.Q. at 218.

In *Astra Pharmaceutical Products, Inc. v. Beckman Instruments, Inc.*, 718 F.2d 1201, 220 U.S.P.Q. 786, 790 (1st Cir. 1983), both parties marketed and sold goods under the mark ASTRA to the same purchasing institution—large hospitals. Opposer sold local anesthetics, cardiovascular medicines and prefilled syringes to hospital pharmacists and anesthesiologists, whereas applicant sold a highly technical and large blood analyzing machine to specialists in hospital chemistry laboratories. The court stated that “[i]f likelihood of confusion exists, it must be based on the confusion of some relevant person; *i.e.*, a customer or purchaser.” *Id.* at 1206, 220 U.S.P.Q. at 790. Noting that similarity of trade channels or overlap of customers is not established simply because both parties conduct business in the same general field and sell their products to the same institution, the court found the purchasing institution, a hospital, not to be the relevant purchaser as it “is composed of separate departments with diverse purchasing requirements, which, in effect, constitute different markets for the parties’ respective goods.” *Id.* at 1207, 220 U.S.P.Q. at 791; *see also Electronic Design*, 954 F.2d at 717.

It also bears noting that it would be inconsistent with the Board’s holding in *Medinol Ltd. v. Neuro Vasx Inc.*, 67 U.S.P.Q. 2d 1205 (T.T.A.B. 2003), and the many unpublished decisions that have followed in its wake<sup>[1]</sup> to accord too wide a scope to a chosen specification of goods if that specification bears insufficient relationship to the actual goods on which the mark is used. Otherwise, simply by claiming too broad a specification, a registrant would be able to attain unfairly broad rights covering goods or services on which it does not use its mark – the very evil Medinol sought to prevent.

As such, although the parties' products may be used on hair, confusion is unlikely considering that the products are unrelated and marketed to entirely different classes of consumers. *See Electronic Design*, 954 F.2d at 717 (where both parties' goods were purchased by the same large corporations with individual departments, "it cannot be presumed, as the Board apparently did, that the [Opposer's] general computer services are selected by the same individuals who select [Applicant's] battery chargers and power supplies.").

#### **The Parties' Marks Are Easily Distinguished**

Even if the marks were identical, it would not necessarily result in a finding of a likelihood of confusion, as many cases have found that two marks sharing common terms but combined with other elements are sufficiently different in their entireties to avoid a likelihood of confusion.[2] *See, e.g., Conde Nast Publications, Inc. v. Miss Quality, Inc.*, 507 F.2d 1404 (C.C.P.A. 1975) (COUNTRY VOGUES for ladies" and misses" dresses is not confusingly similar to VOGUE magazine); *see also Lever Bros. Co. v. Barcelene Co.*, 463 F.2d 1107 (C.C.P.A. 1972) (ALL CLEAR for household cleaner not confusingly similar to ALL household cleaning products); *Plus Prods. v. Natural Organics, Inc.*, 204 U.S.P.Q. 773 (T.T.A.B. 1979) (PLUS and NATURE'S PLUS, both for vitamins, not confusingly similar); *Plus Prods. v. General Mills, Inc.*, 188 U.S.P.Q. 520 (T.T.A.B. 1975) (PROTEIN PLUS for breakfast cereal and PLUS for vitamin and mineral products and food supplements not confusingly similar); *Marshall Field & Co. v. Mrs. Fields Cookies*, 25 U.S.P.Q.2d 1321 (T.T.A.B. 1992) (holding that MARSHALL FIELD'S and FIELD'S, both for department store services including baked goods, created no likelihood of confusion with MRS. FIELDS, for cookies and brownies); *Freedom Savings & Loan Ass'n v. Way*, 757 F.2d 1176, 1182 (11th Cir. 1985); *Alltel Corp. v. Actel Integrated Communications, Inc.*, 42 F. Supp. 2d 1265, 1270 (S.D. Ala. 1999).

Even marks that are identical in sound and/or appearance may create sufficiently different commercial impressions when applied to the respective parties' goods or services so that there is no likelihood of confusion. *See In re Shoe Works*, 6 U.S.P.Q.2d 1890 (T.T.A.B. 1988) (no likelihood of confusion between two users of PALM BAY mark on wearing apparel); *In re British Bulldog, Ltd.*, 224 U.S.P.Q. 854 (T.T.A.B. 1984) (PLAYERS for men's underwear held not likely to be confused with PLAYERS for shoes, the Board finding that the term PLAYERS implies a fit, style, color and durability adapted to

outdoor activities when applied to shoes, but “implies something else, primarily indoors in nature” when applied to men’s underwear); *In re Sydel Lingerie Co., Inc.*, 197 U.S.P.Q. 629 (T.T.A.B. 1977) (BOTTOMS UP for ladies’ and children’s underwear held not likely to be confused with BOTTOMS UP for men’s clothing, the Board finding that the term connotes the drinking phrase “Drink Up” when applied to men’s suits, coats and trousers, but does not have this connotation when applied to ladies’ and children’s underwear). Thus, each case must be decided on its own facts and circumstances, including “the nature and impact of the marks.” *In re British Bulldog, Ltd.*, 224 U.S.P.Q. at 856 (quoting *In re Sydel Lingerie*, 197 U.S.P.Q. at 630).

### **ROTORAZOR Is a Weakly Descriptive Mark**

The strength of a mark is determined by its distinctiveness. *See, e.g., Sara Lee Corp. v. Kayser-Roth Corp.*, 81 F.3d 455, 464, 38 U.S.P.Q.2d 1449 (4th Cir. 1996). Distinctiveness is characterized by whether the mark is considered “fanciful,” “arbitrary,” “suggestive,” “descriptive,” or “generic,” in descending order of strength. *See id.* Descriptive and suggestive marks are presumptively weak, while fanciful and arbitrary marks are afforded greater protection. *Brookfield Comm., Inc. v. West Coast Entertainment Corp.*, 174 F.3d 1036, 1058, 50 U.S.P.Q.2d 1545, 1560 (9th Cir. 1999); *Virgin Enterprises Ltd. v. Nawab*, 335 F.3d 141, 147-48, 67 U.S.P.Q.2d 1420, 1425-26 (2d Cir. 2003).

ROTORAZOR is best categorized as descriptive (as previously argued) – or at most suggestive – thus affording it only modest scope of protection. A suggestive mark “merely suggests the features of the product, requiring the purchaser to use imagination, thought, and perception to reach a conclusion as to the nature of the goods.” *Lane Capital Mgmt., Inc. v. Lane Capital Mgmt. Inc.*, 192 F.3d 337, 344, 52 U.S.P.Q.2d 1094 (2d Cir. 1999). To be considered suggestive (as opposed to arbitrary or fanciful), the mark need not describe the goods entirely, but rather suggest certain features of the goods, as the cited mark does here. *See, e.g., Independent Nail & Packing Co. v. Stronghold Screw Prods., Inc.*, 205 F.2d 921, 925 98 U.S.P.Q. 172 (7th Cir. 1953) (“Stronghold” suggestive of plaintiff’s nail products).

Widespread use and the obvious meaning of “Roto” further weakens Registrant’s mark. Whether or not there are only two applications or registrations in the subject class, the International Classes are for administrative convenience only. The important point is that Roto is widely used and hence can not be distinctive. Indeed, the Examining Attorney does not contest that the PTO registry lists at least 262



applications or issued registrations incorporating the primary element "ROTO". And it is no surprise that so many marks have been able to co-exist peacefully on the Principal Register for years with no known instance of confusion. Because the root "Roto" is descriptive of rotation and is used in precisely that way by the Registrant, consumers have no difficulty distinguishing innumerable products incorporating the term. Because the registered mark is so weakly descriptive, it is entitled to only the narrowest scope of protection. *See Moose Creek, Inc.*, 73 U.S.P.Q.2d at 1293 ("[M]embers of the public...have likely seen a picture of a realistic-looking moose on many different brands of clothing, and thus are not likely to associate an Abercrombie product containing a picture of a moose exclusively with Plaintiffs' Moose Creek clothing brand."); *Abraham Zion Corp.*, 761 F.2d at 111 (affirming the district court's finding of no likelihood of confusion based, in part, on "evidence that there are several fashion designers who have the same surnames and operate in the marketplace without apparent consumer confusion").

### CONCLUSION

Based upon the foregoing, Applicant submits that the mark ROTO SHAVE is entitled to registration on the Principal Register. Applicant thus respectfully requests that the Examiner withdraw the 2(d) objection and pass the application on to publication. In case this Request for Reconsideration is denied, Applicant has also concurrently filed a Notice of Appeal.

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[1] *See Standard Knitting Ltd. v. Toyota Jidosha Kabushiki Kaisha*, Opposition No. 91116242 (T.T.A.B. 2006); *J. E. M. International, Inc. v. Happy Rompers Creations Corp.*, Cancellation No. 92043073 (T.T.A.B. 2005); *Physicians Formula Cosmetics, Inc. v. Cosmed, Inc.*, Cancellation No. 92040782 (T.T.A.B. 2005); *Tequila Cazadores S.A. v. Tequila Centinela, S.A.*, Opposition No. 91125436 (T.T.A.B. 2004); *Orion Electric Co. v. Orion Electric Co.*, Opposition No. 9112807 (T.T.A.B. 2004); *Hawaiian Moon, Inc. v. Doo*, Cancellation No. 92042101 (T.T.A.B. 2004); *Jimlar Corp. v. Monterexport S.P.A.*, Cancellation No. 92032471 (T.T.A.B. 2004); *Nougat London Ltd. v. Garber*, Cancellation No. 40,460 (T.T.A.B. 2003).

[2] Whether a likelihood of confusion exists must depend ultimately on the overall impression the marks leave on consumers. In evaluating overall impressions on consumers, each mark must be viewed in its entirety and not judged by its individual components. *Professional Art Distribution, Inc. v. Internationaler Zeichenverband Fur Kunstdruckpapier*, 878 F.2d 1445 (Fed. Cir. 1989). The Examining Attorney must focus on each mark as a whole, based on its overall sight, sound, and connotation, instead of just its component parts. *See In re Nat'l Data Corp.*, 753 F.2d 1056, 1058 (Fed. Cir. 1985); *see also*

*Massey Junior College, Inc. v. Fashion Inst. of Tech.*, 492 F.2d 1399, 1402 (C.C.P.A. 1974); J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition*, §23.15[1](a)(4<sup>th</sup> ed.). Even if each mark contains common or similar words, the marks should be considered in their entirety. See also *Estate of P.D. Beckwith, Inc. v. Comm'r of Patents*, 252 U.S. 538, 545-6 (1920) ("The commercial impression of a trademark is derived from it as a whole, not from its elements separated and considered in detail. For this reason it should be considered in its entirety . . . , and to strike out any considerable part of it, certainly any conspicuous part of it, would be to greatly affect its value.") The test is the impression created by each mark as a whole as perceived by the average reasonably prudent purchaser. *Clairol, Inc. v. Roux Labs, Inc.*, 442 F.2d 980 (C.C.P.A. 1971); *Colgate-Palmolive, Co. v. Carter-Wallaced, Inc.*, 432 F.2d 1400 (C.C.P.A. 1970). The "well established" standard for judging the similarity of appearance of marks is an assessment of "the total effect of the designation, rather than . . . a comparison of individual features." *Sun Banks of Florida v. Sun Federal Savings and Loan*, 211 U.S.P.Q. 844, 850 (5th Cir. 1981) (citations omitted). Viewed in their entirety, Applicant's mark differs conspicuously in overall appearance from the cited application.

#### **EVIDENCE**

Evidence in the nature of Exhibit A-E has been attached.

##### **Original PDF file:**

[http://tgate/PDF/RFR/2007/10/30/20071030163614674596-78884488-001\\_001/evi\\_3811218420-163024209\\_Exhibit\\_A-E.pdf](http://tgate/PDF/RFR/2007/10/30/20071030163614674596-78884488-001_001/evi_3811218420-163024209_Exhibit_A-E.pdf)

##### **Converted PDF file(s) (11 pages)**

Evidence-1

Evidence-2

Evidence-3

Evidence-4

Evidence-5

Evidence-6

Evidence-7

Evidence-8

Evidence-9

Evidence-10

Evidence-11

#### **SIGNATURE(S)**

##### **Request for Reconsideration Signature**

Signature: /Jonathan Moskin/ Date: 10/30/2007

Signatory's Name: Jonathan Moskin

Signatory's Position: Attorney of record

The signatory has confirmed that he/she is an attorney who is a member in good standing of the bar of the highest court of a U.S. state, which includes the District of Columbia, Puerto Rico, and other federal territories and possessions; and he/she is currently the applicant's attorney or an associate thereof; and to the best of his/her knowledge, if prior to his/her appointment another U.S. attorney or a Canadian attorney/agent not currently associated with his/her company/firm previously represented the applicant in this matter: (1) the applicant has filed or is concurrently filing a signed revocation of or substitute power of attorney with the USPTO; (2) the USPTO has granted the request of the prior representative to withdraw; (3) the applicant has filed a power of attorney appointing him/her in this matter; or (4) the applicant's appointed U.S. attorney or Canadian attorney/agent has filed a power of attorney appointing him/her as an associate attorney in this matter.

The applicant is filing a Notice of Appeal in conjunction with this Request for Reconsideration.

Serial Number: 78884488

Internet Transmission Date: Tue Oct 30 16:36:14 EDT 2007

TEAS Stamp: USPTO/RFR-38.112.184.20-2007103016361467

4596-78884488-40035feeea4dc0f1f745ce3616

dab040b-N/A-N/A-20071030163024209285

# Exhibit A

...  
Shaving

## Emjo® ROTO SHAVE™

AP-3RS | RotoShave  
(Cordless)

The Emjo® RotoShave is a groundbreaking rechargeable razor that combines the ease of use and convenience of an electric shaver with the closeness and efficiency of a razor blade. 9 rotating blades at 30 revolutions per second (an amazing 270 times per second) touch the skin leaving you with a faster, closer and smoother shave. The Emjo® RotoShave is equipped with patented safety guards and patented spiral windings. The combination of these safety features help to minimize irritation and virtually eliminate nicks and cuts, leaving the skin smoother than other electric or manual shaving methods.



Emjo® RotoShave:  
AP-3RS (Cordless) includes: electric  
razor, 2 cartridges each featuring  
9 blades, a travel charging stand,  
travel pouch and carrying case.



Emjo® Power 9  
AP-3V (operates on 1 AA battery)  
Includes vibration handle and 9 blades  
(rotor featuring 3 sets of blades)

## POWER 9™

AP-3V | Power 9  
(Battery - Corded)

The Emjo® Power 9 is an innovative razor that has 3 sets of 3 patented multi angle blades built in so when you are ready for a new razor just click over for a fresh blade. Patented safety guards act as a barrier between the blades and your skin; glides over moles and other skin imperfections without nicks and cuts. The Emjo® Power 9 features patented spiral windings to virtually eliminate irritation. Vibration improves shaving quality and massages the skin and the rubberized grip gives control all over the face and neck.

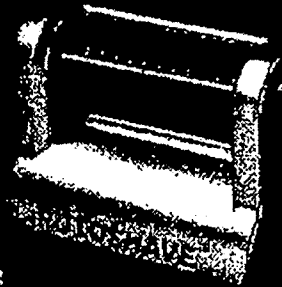


Emjoi®  
TECHNOLOGY THAT GETS PERSONAL

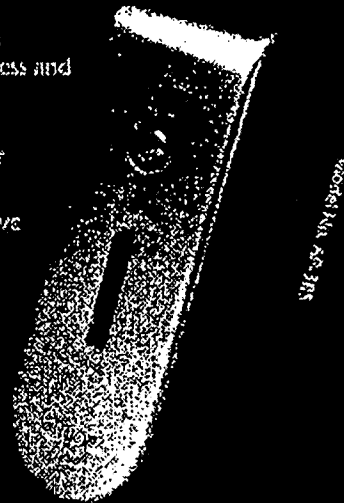
Patented Multi-angle blade with unique safety guard & spiral winding system

9 Rotating blades at high speed giving the fastest and closest shave ever.

The Emjoi® RotoShave is a ground breaking rechargeable razor featuring Patented Multi-Angle blades with unique safety guard & spiral winding system. It combines the ease of use and convenience of an electric shaver with the closeness and efficiency of a razor blade. 9 Rotating blades at high speed giving the fastest and closest shave ever.



- Emjoi Rotoshaver combines the ease of use and convenience of an electric shaver with the closeness and efficiency of a razor blade
- The skin is touched by 9 rotating blades at 30 revolutions per second an amazing 270 times per second
- Gives you a closer, safer, faster and smoother shave than any other razor
- Patented Safety Guards act as a barrier between the blades and your skin, glides over moles and other skin imperfections without nicks and cuts
- Features patented Spiral Windings to virtually eliminate irritation
- Electric wet shave
- Dual speed for light or heavy hair



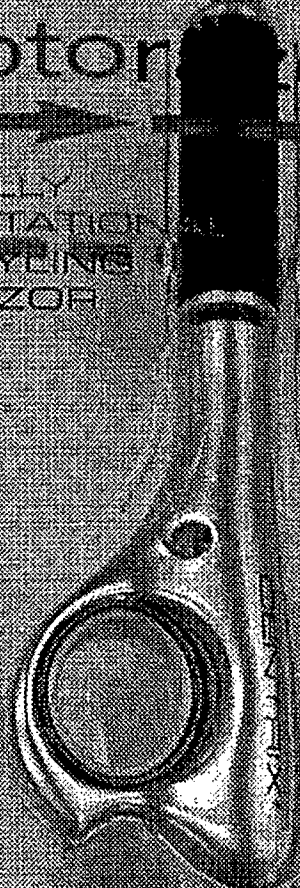
Emjoi®  
ROTO SHAVER



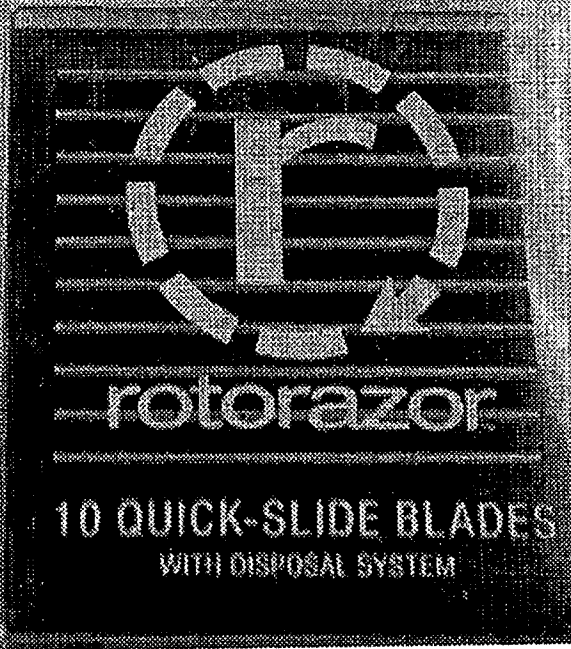
## Exhibit B

rotorazor

FULLY  
ROTATIONAL  
STYLING  
RAZOR

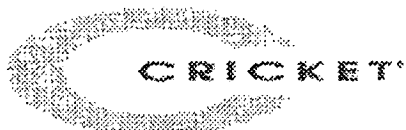


6 LOCK-IN POSITIONS





# Exhibit C

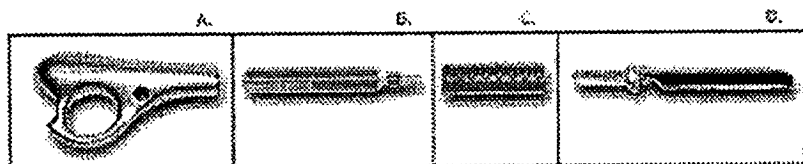
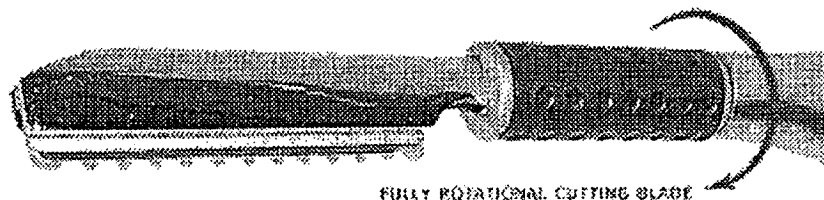


PRIVATE LABEL SHEAR SERVICES AWARD  
CENTRIX SHEARS CRICKET SHEARS IMPLEMENTS BRUSHES COMBS APPAREL API



Rotorazor™, revolutionary tool created by Centrix® which allows versatility in the razor styling category combined with ergonomic comfort. When it comes to razor techniques, Rotorazor™ is the only choice.

From its fully rotational cutting blade that locks into place, to the ergonomically designed handle, the Centrix® Rotorazor™ will add even more dimension to all of your razoring techniques.



Patent No.: 6,871,403

#### <<< MAIN SHEAR MENU

#### Rotorazor

The first MAJOR ADVANCEMENT in styling razor technology!

When left open, the stylist can rotate the blade 360° for advanced texturizing techniques.

The revolving blade shaft lets you control the direction of the cutting blade for optimal performance. Locks into 6 different positions to maximize cutting angles and comfort.

The ergonomically designed handle balances comfortably in the hand with custom finger sizes to achieve a perfect fit.

Easy slide-on blade design. Never touch a razor blade again! Blade case also features blade removal and disposal slot.

A. Ergonomic balanced handle

B. Revolving steel shaft

C. Non-slip grip

D. Stainless steel blade slider

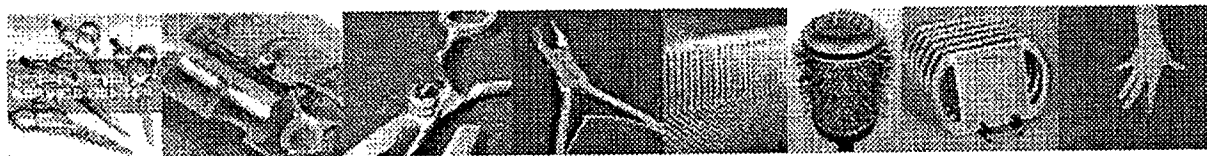
E. Protected blade

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Exhibit D



*Providing all the tools needed to propel your business beyond expectations*



HOME SERVICES   COUNTRY HOMES   COUNTRY HOMES   COUNTRY HOMES   COUNTRY HOMES   COUNTRY HOMES   COUNTRY HOMES

DISTRIBUTION 0

VIEW COURSE

AWARDS | JOBS | PRIVATE LABEL | CONTACT | ABOUT US

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## Exhibit E



PRIVATE LABEL SHEAR SERVICE AWARD  
CENTRIX SHEARS CRICKET SHEARS IMPLEMENTS BRUSHES COMBS APPAREL API

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## Press Articles

[Beauty Store Business - View from the top 03/04 \(PDF\)](#)

## Cricket® Company Biography

The Cricket® Company was founded in 1979 by Wayne Clark, hairstylist and was very frustrated by the quality and lack of manufacturers when it came to brushes, combs, shears, appa

The first Cricket® product was launched as an exclusive for W their selling area. The product was a brush called the "RP". Th handled round brush with nylon bristles, as well as the first br marketed for salon retail. It was such a success in the West C market that Wayne made the decision to take Cricket® nation:

From there Cricket® continued to pioneer and market compell hairstylists. Cricket® was the first company to introduce "Stati high end round brushes such as Technique (still the #1 round industry), Silkombs™, Boar Bristle, Nylon/Boar Mix, and count products. Cricket® also developed a high quality line of appare fashion" and trendy patterns as well as everyday capes, cover the haircutting, waterproof, and all purpose categories. Cricket marketing and design has brought home 7 ABBIES Awards ov as well as the winner of the first ever "Golden ABBIE". In 200: ABBIES for the "Best Overall Sales Promotion". This award cc every category in the professional industry....quite an accompl

Wayne then got into the shear business and Centrix® was cre design, ergonomic comfort, and performance all came togethe shears. Centrix's® marketing discouraged "price off" and Way and other professionally based gift with purchase that enticed Centrix® shears knowing they would be buying a quality produ value gift in appreciation for their business. Since the creation Choice" awards 5 years ago, Centrix® has won that award for

The Cricket® Company continues to grow at a remarkable pac growth industry, Cricket® is showing increases of 23% over th years. New and innovative products such as the Sci:Tec™ br StraightCrazy™ and X2 Ceramic flat irons, and plans for much

Jared Clark, Wayne's son is the General Manager and leader started in the industry as a teenager and has proven himself a The rest of the Cricket® team is made up of people with great combined with creativity, customer care, and a strong work etl

Cricket®.....The Professional Stylist's partner.

[<<< HOME PAGE](#)

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